Why Do Good People Do Bad Things? A Multi-Level Analysis of Individual, Organizational, and Structural Causes of White-Collar Crime

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INTRODUCTION

In 2013, Kareem Serageldin was sentenced to imprisonment for thirty months for conspiracy to falsify books and records of a financial institution.[1] Serageldin participated in a scheme to inflate the value of mortgage-backed securities owned by the Credit Suisse Group as the subprime credit crisis escalated in 2007 and 2008.[2] The offense carried a maximum sentence of five years imprisonment and a maximum fine of $250,000 or two times the gross pecuniary gain or loss associated with the offense.[3] The sentencing guidelines called for a prison sentence in the range of fifty-seven to sixty months, plus supervised release.[4] However, Judge Hellerstein sentenced Serageldin to thirty months imprisonment and imposed a fine of $150,000—staying far below the presumptive sentencing guidelines.[5] He determined that Serageldin deserved a lighter sentence because Serageldin was working in a climate in Credit Suisse where such wrongdoing was routine.[6] Despite receiving a lighter sentence than anticipated, Serageldin still experienced an extraordinary fall from grace. A graduate of Yale University, earning almost seven million dollars a year at the height of his career, he subsequently spent his nights in a

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1. Sentencing Hearing at 51, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013). *See generally* Complaint, Sec. Exch. Comm'n v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878.

2. Complaint at 1, Sec. Exch. Comm'n v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878.

3. Pleading Hearing at 10, United States v. Serageldin, No. 1:12-CR-00090 (S.D.N.Y. May 10, 2013).

4. *Id.* at 9.

5. Sentencing Hearing at 51, 55, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

6. *Id.* at 9.

prison cell the size of a basketball court with seventy others.[7] Serageldin also earned the dubious distinction of being the only banker who was jailed for having some role in causing the financial crisis in the United States.[8] Acknowledging Serageldin's lack of previous criminal convictions and low chance of recidivism, Judge Hellerstein mused, "[T]here's a deepening mystery in my work: Why do so many good people do bad things?"[9]

Why did Serageldin do it? This Article uses the Serageldin case as a vignette to highlight some of the complexities regarding the motivations of white-collar criminals, the importance of organizational culture in creating situational conditions for wrongdoing, and structural explanations for white-collar crime. Serageldin's story both supports and contradicts various aspects of individual, organizational, and structural explanations for crime. In order to better understand Serageldin's case, this Article engages in a multi-level analysis of explanations by integrating existing theories, highlighting areas of disagreement and opposing views, and demonstrating that some explanations are more valuable than others. Moreover, though, based on a single case study, there is methodological strength in focusing on the psychosocial processes which impact the individual, particularly when the data available for analysis is sufficiently rich as to allow for various complex narratives about this wrongdoer's role in criminality.[10]

This Article draws on the Securities and Exchange Commission's (SEC) complaint against Serageldin, the transcript for his plea hearing, and the transcript for his sentencing hearing.[11] The SEC's complaint provides a prosecutorial account of the fraud. It also includes actual extracts from Serageldin's recorded phone calls at Credit Suisse which provide a real-time narrative of the fraud. The court transcripts detail Serageldin's own account of the fraud and give a biographical account of Serageldin's life, provided by his mother, who offered character evidence on his behalf.

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7. Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html [https://perma.cc/L76L-GYAL].

8. Henry N. Pontell, William K. Black & Gilbert Geis, *Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 CRIME L. & SOC. CHANGE 1, 1 (2014).

9. Sentencing Hearing at 28, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

10. Shadd Maruna & Amanda Matravers, *N=1: Criminology and the Person*, 11 THEORETICAL CRIMINOLOGY 427, 427–29 (2007).

11. *See generally* Complaint, Sec. Exch. Comm'n v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878; Sentencing Hearing, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013); Pleading Hearing, United States v. Serageldin, No. 1:12-CR-00090 (S.D.N.Y. May 10, 2013).

These perspectives allowed for the recasting of the SEC's account of the fraud and reframed it in light of Serageldin's personal circumstances, casting the banker as the fallen hero of his own narrative.[12] The significance of these narratives is less in their content and more in the way they are told; they may have allowed Serageldin to deceive himself about the extent of his involvement in the fraud and his motivations for committing it. The narratives locate his individual decision within a corporate culture where wrongdoing was seemingly routine and within the structural context of a crashing securities market. Therefore, these contemporaneous and post-hoc accounts of the fraud are valuable because they facilitate the problematization of the causal explanations of this crime along individual, organizational, and structural lines of analysis.

I. THE SERAGELDIN CASE AS A VIGNETTE: "PEOPLE ARE EXPECTING US TO MAKE MONEY"

Kareem Serageldin was the Global Head of Structured Credit Trading at Credit Suisse. He had a reputation for working long hours and living modestly, earning himself the nickname "the investment banking monk."[13] The son of Egyptian immigrants of modest means, he overcame adversity and excelled in his studies. He completed a bachelor's degree in mechanical engineering at Yale University. By the age of 33, he was earning $7 million a year as the Global Head of Structured Credit Trading for Credit Suisse. According to the SEC, he was also the architect of a massive fraudulent scheme to mismark mortgage-backed securities as the subprime credit crisis escalated in 2007 and 2008, hiding losses to make the securities appear more valuable than was really the case. The SEC alleged that Serageldin conspired with David Higgs, the Head of Hedge Training, and two New York-based traders who reported to Serageldin, Faisal Siddiqui and Salmaan Siddiqui. Serageldin and Higgs were UK residents but traveled to New York regularly—where the bulk of the violations occurred. The scheme appears to have commenced in August 2007 and concluded in January 2008—though Serageldin disputed the point at which he became involved in the fraud, among other matters. The fraud persisted, according to the SEC, because "accurately recording the decline in value would cause hundreds of millions of dollars of losses, vaporize Defendant[']s] hopes for multi-million dollar year-end bonuses

12. *See generally* Celia Moore, *Always the Hero to Ourselves: The Role of Self-Deception in Unethical Behavior*, *in* CHEATING, CORRUPTION, AND CONCEALMENT: THE ROOTS OF DISHONESTY 98 (2016).

13. Eisinger, *supra* note 7.

and, in the case of Serageldin, imperil a highly-coveted promotion."[14] The fraud unfolded as follows.

Traders must price or mark the securities they hold on their books at the same time every day to record their value in a fair, accurate, and consistent way. Credit Suisse reported the results in accordance with U.S. Generally Accepted Accounting Principles (GAAP) and adopted Statement of Financial Accounting Standards No. 157 (SFAS 157). SFAS 157 requires that securities be marked at a price that they can be sold at between market players on the measurement date. Traders should comply with this requirement by looking at the prices received for identical securities in an active market, or in the absence of those, quotes for identical or similar securities in inactive markets (where, for example, such securities are not often traded, and less information is available). Traders should also consider information from Credit Suisse's trading desks. Traders must fairly report the price that can be achieved at the current time of measurement, not the likely price that can be achieved at a later date when a bond matures, even where the market is significantly depressed or in turmoil at the time of measurement.

In August 2007, the credit markets were increasingly distressed, and traders in subprime mortgages were required to consult the ABX index—which benchmarks the value of these products according to the year in which they are issued. The SEC alleged that as the market deteriorated, Serageldin and Higgs were worried about AAA-rated bonds backed by subprime mortgages, which they held in a trading book called ABN1. A reduction in the value of ABN1 would cause enormous losses because the portfolio contained $3.5 billion in securities. Until August 2007, the prices of securities in the ABN1 book were automatically priced by a service called the Financial Times Interactive Data (FTID). Subsequently, a new system was implemented to provide senior management with real-time price reports for securities. As a result, Serageldin and Higgs started to more actively monitor the prices of securities to reach daily and monthly P&L goals.

The SEC extensively detailed how and when the securities were falsely remarked. For example, on August 29, 2007, when the FTID prices were downloaded to the ABN1 spreadsheet, the prices showed a loss of $75 million. Higgs, Salmann Siddiqui, and a trading assistant manually changed the prices of the securities several times on a trial and error basis to reduce the loss, with Salmaan Siddique noting, "Hopefully this should get us something close to what we need."[15] Recordings of the phone calls

14. Complaint at 2, Sec. Exch. Comm'n v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878.

15. *Id.* at 12.

with Credit Suisse revealed the efforts to mismark the securities to inflate their value:

> Trading Assistant: I'm just putting those prices in, I just wanted to warn you it's not going to make what you think it's going to make . . . I think basically if we put them in we probably make around $200,000.
>
> Salmaan Siddiqui: Oh, God!
>
> Trading Assistant: Which was not what you were expecting . . . [16]

Another recording on August 31, 2007, showed how the traders were attempting to hit performance targets; the trading assistant told Siddique that they were "going to need quite a bit more P&L . . . . Overall, in ABN we're currently down about 25 now . . . David [Higgs] said we can't be more than a couple down in ABN."[17]

The SEC argued that the defendants were routinely mismarking securities by September 2007, when "Serageldin frequently communicated to Higgs the specific P&L outcome he wanted."[18] The SEC also detailed how profits on securities from other books were being used to offset losses from the ABN1 book, which had been artificially marked up to unrealistic levels. In another recorded phone call on September 13, 2007, a trading assistant and Serageldin discussed moving prices to best suit their needs:

> Trading Assistant: We've got 10 bucks [million] in RCV [another book]. We had a big [P&L] number but with Dave [Higgs] and Faisal we're using it to write down some positions in ABN.
>
> Serageldin: Which positions?
>
> Trading Assistant: Just some bonds that were overpriced and to re-mark the CMBX index to where it is. If you want it [P&L] to be a big number let me know what you want, then I'll just go through it with Dave [Higgs], because obviously I can move things back to where they were.
>
> Serageldin: If we made a lot of money it would be nice to take it, once in a while.[19]

On a subsequent occasion on October 17, 2007, Serageldin was recorded telling Higgs that P&L must be adjusted again because senior management expected him to make money from his trades, stating: "I want

16. *Id.*
17. *Id.* at 13.
18. *Id.* at 15.
19. *Id.* at 16.

to be up a little bit of money today, because everyone's going to think we're going to be up and be very surprised if we're not."[20] The team continued to mismark the value of the securities in November and December, and Serageldin, fearing detection, acknowledged in another recorded phone call that the P&L was overvalued at year-end:

> Serageldin: The dollar prices of our floating rates and fixed rates honestly are quite high, right?
>
> Higgs: I agree they are quite high.
>
> . . . .
>
> Serageldin: Why can't we lower the dollar prices on that stuff?
>
> Higgs: They definitely should be marked down.
>
> Serageldin: We should mark these down because someone is going to spot this. On the fixed rates we have some room, but not on the floating rates, we don't. On the other desk, right, the floating rate, the bonds are marked below the index.[21]

However, on January 7, 2008, Serageldin subsequently approved the year-end prices without adjusting them downwards. In a call to Higgs two days later, Serageldin indicated that the mismarking was necessary because management expected him to generate high earnings from his books, stating, "People are expecting us to make money. [The head of Credit Suisse Group's investment bank] knows what our positions are. Today, we have to be up at least 10 bucks [million]. . . . I know it's hard when you've got things that aren't necessarily quite marked where they need to get marked."[22]

On February 12, 2008, Credit Suisse reported a net income of $7.12 billion for the year 2007 and $1.16 billion in earnings for the fourth quarter of that year.[23] Within days, detecting that the defendants had materially misstated the values of their securities, Credit Suisse announced on February 19, 2008, that its statement of earnings was inaccurate.[24] A subsequent report on March 20, 2008, restated a reduction in earnings for 2007 in the amount of $2.65 billion.[25] The ABN1 book was written down by $1.3 billion, approximately half of the overall losses. That same day, Credit Suisse announced that it fired or suspended the traders who had

20. *Id.* at 17.
21. *Id.* at 23–24.
22. *Id.* at 24.
23. *Id.* at 25.
24. *Id.*
25. *Id.*

mismarked the securities.[26] Serageldin was subsequently prosecuted in the Southern District of New York for mismarking securities. He pleaded guilty to conspiracy to falsify books and records of a financial institution before Judge Alvin K. Hellerstein on April 12, 2013. The offense carried a maximum sentence of five years of imprisonment and a maximum fine of $250,000 or two times the gross pecuniary gain or loss associated with the offense. The sentencing guidelines indicated that a prison sentence of fifty-seven to sixty months and a fine of $10,000 to $100,000 was appropriate. Judge Hellerstein, however, sentenced Serageldin to thirty months imprisonment and fined him $150,000. Serageldin achieved infamy as the only banker in the U.S. to go to jail for having some role in the financial crisis.[27]

II. WHAT MOTIVATES WHITE-COLLAR CRIMINALS?: "I LOVED MY JOB"

Gottfredson and Hirschi argue that crime is the result of a lack of self-control[28] that arises when an individual's bond with society is broken.[29] Strong self-control results in better academic performance and greater career prospects, while a lack of self-discipline among offenders from an early age may result in the commission of a crime. While some studies link corporate executives with longer patterns of criminal offending,[30] other empirical work suggests that white-collar criminals demonstrate great discipline in their studies and in their careers. For example, Wheeler et al. conclude that white-collar criminals tend to have more stable employment histories and higher educational attainment than that of ordinary criminals or the general public.[31] Similarly, Benson and Moore conclude that white-collar criminals were less than half as likely to have a previous criminal conviction as ordinary criminals and that they were more likely to do well academically and be more socially adjusted.[32] Unlike Gottfredson and Hirschi, Benson and Moore conclude that white-collar criminals have moderate self-control and that opportunity, macro-social, economic, and organizational processes lead to crime.

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26. *Id.* at 26.

27. Eisinger, *supra* note 7.

28. *See generally* MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

29. *See generally* TRAVIS HIRSCHI, CAUSES OF DELINQUENCY (1969).

30. *See generally* Robert Davidson, Aiyesha Dey & Abbie Smith, *Executives' "Off-the-Job" Behavior, Corporate Culture, and Financial Reporting Risk*, 117 J. FIN. ECON. 5 (2015).

31. STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 70 (1988).

32. *See* Michael L. Benson & Elizabeth Moore, *Are White-Collar and Common Offenders the Same? An Empirical and Theoretical Critique of a Recently Proposed General Theory of Crime*, 29 J. RES. CRIME & DELINQ. 251, 260, 263 (1992).

In the corporate context, the key is not that an individual's link to society is broken, but rather to what extent that individual's connection to the company is maintained. Research suggests that individuals who have strong interpersonal attachments, investment in their careers, involvement in their work, and loyalty to the goals of the organization are less likely to commit white-collar crimes.[33] The issue of organizational context, or corporate culture, is discussed further in the second part of this article. Perhaps, however, the problem is not individual self-control per se, but instead the lack of institutional and regulatory controls, which gives rise to the lack of supervision, interventions, and oversight that eventually lead to adverse consequences. This macro-structural issue is discussed further in the third part of this article.

Scholars have also long since thought that committing a crime involves the logical weighing of benefits and burdens. Bentham argued that if the punishment is greater than the perceived benefit of the crime, the potential offender will be deterred. He stated, "[T]he evil of the punishment must be made to exceed the advantage of the offense."[34] Becker developed this theory in a modern context.[35] Crime, he suggested, is an economically important activity, and people are rational utility maximizers. Becker reasoned:

> A person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities. Some persons become 'criminals,' therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ."[36]

Becker also rejected "ad hoc concepts of differential association, anomie, and the like."[37] Instead, he noted that the calculation depended, among other things, on the probability of detection, apprehension, conviction, and form of punishment. Offenders do not need to be perfectly ra-

33. James R. Lasley, *Toward a Control Theory of White-Collar Offending*, 4 J. QUANTITATIVE CRIMINOLOGY 347, 348 (1988).

34. JEREMY BENTHAM, THEORY OF LEGISLATION 325 (Richard Hildreth trans., Trübner & Co. 2d ed. 1871).

35. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

36. *Id.* at 176.

37. GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 46 (1976); *see* Anthony Bottoms & Andrew Von Hirsch, *The Crime-Preventive Impact of Penal Sanctions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 97, 106 (Peter Cane & Herbert M. Kritzer eds., 2010).

tional calculators for this theory to work; they may exercise "bounded rationality" so that they understand costs and benefits as they apply to their ways of thinking and beliefs.[38]

Soltes argues that although white-collar criminals are thought to mindfully weigh the costs and benefits of their actions when deciding to commit crime, his personal correspondence with white-collar prisoners demonstrates that they are rarely so rational in practice.[39] He suggests, "They seem to have reached their decisions to commit crimes with little thought or reflection. In many cases, it was difficult to say they had ever really 'decided' to commit a crime at all."[40] It was not that they were worried they would get caught, he suggests, but that they simply did not consider that they were doing anything harmful.[41] This view is not peculiar to the white-collar crime context; other empirical research suggests that the vast majority of ordinary criminals give little or no thought to getting caught or punished.[42] Nevertheless, some scholars continue to use the cost-benefit analysis in seeking to explain why people commit white-collar crimes. For example, in the U.S., where "law and economics' theories have come to dominate academic literature on enforcement,"[43] many scholars expansively employ this theoretical lens to consider behavioral issues relating to the motivations, personalities, temperaments, and senses of identity of the offenders.[44]

Other work has focused more specifically on the individual personalities and traits of white-collar criminals to explain their motivations behind committing crimes. Some scholars suggest that white-collar criminals tend to be irresponsible and prone to risk-taking.[45] It is suggested that in general, white-collar criminals are more hedonistic, narcissistic, and conscientious than non-criminal managers,[46] though others have determined less conscientiousness among employees who

38. *See* EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 104 (2016).

39. *Id.* at 93–98.

40. *Id.* at 6.

41. *Id.*

42. David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 308 (2002).

43. CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS 56 (2015).

44. *See generally, e.g.*, Claire Hill, *Towards (More) of an Understanding of Criminal—and Merely Bad—Corporate Conduct*, *in* WHITE COLLAR CRIME IN IRELAND LAW AND POLICY 33 (Joe McGrath ed., 2019).

45. *See, e.g.*, Judith M. Collins & Frank L. Schmidt, *Personality, Integrity, and White Collar Crime: A Construct Validity Study*, 46 PERSONNEL PSYCHOL. 295 (1993).

46. *See generally* Gerhard Blickle et al., *Some Personality Correlates of Business White Collar Crime*, 5 APPLIED PSYCHOL.: AN INT'L. REV. 220 (2006).

engage in theft.[47] Other scholars have suggested that white-collar criminals usually exhibit "Type A" personalities, so they are often intelligent, impatient, competitive, and financially motivated.[48] In a study conducted by Bucy et al. in which they interviewed a variety of white-collar crime experts, including former prosecutors, 77.8% of respondents agreed that white-collar criminals fall into the categorization of leader and follower.[49] Other respondents noted that white-collar criminals sometimes find themselves in small schemes that escalate out of control.[50] Leaders are thought to be Type A personalities: intelligent, arrogant, cunning, successful, prone to take risks, aggressive, narcissistic, determined, and charismatic. The respondents stated, almost unanimously, that the main motivating factor for leaders who commit crimes is greed.[51] Other motivating factors include a sense of entitlement, arrogance, competitiveness, and rationalization. Followers who commit crimes are considered weak, convinced of their cause, acting out of loyalty to the leader, or out of fear of losing their jobs. In contrast to leaders, followers are less confident, less aggressive, and more gullible. Others note that white-collar criminals are likely to be charismatic,[52] exercise a desire to be in control,[53] or have "a sense of superiority bordering on narcissism."[54] In some cases, they act because they fear the loss of their status and reputation.[55]

The SEC's complaint indicates that Serageldin was a leader in the scheme to mismark securities at Credit Suisse. The complaint concludes that the "defendants' fraudulent scheme was initiated by Kareem Serageldin."[56] This is evidenced by numerous occasions where Serageldin instructed his subordinates, David Higgs, Faisal Siddique, and Salmaan

47. Arno R. Kolz, *Personality Predictors of Retail Employee Theft and Counterproductive Behavior*, J. PROF. SERV. MKT., Oct. 1999, at 107.

48. Rebecca T. Elliott, *Examining the Relationship Between Personality Characteristics and Unethical Behaviors Resulting in Economic Crime*, 12 ETHICAL HUM. PSYCHOL. & PSYCHIATRY 269 (2010).

49. Pamela H. Bucy et al., *Why Do They Do It?: The Motives, Mores, and Character of White Collar Criminals*, 82 ST. JOHN'S L. REV. 401, 405 (2008).

50. *Id.* at 406.

51. *Id.*

52. Katherine A. DeCelles & Michael D. Pfarrer, *Heroes or Villains? Corruption and the Charismatic Leader*, 11 J. LEADERSHIP & ORG. STUD. 67, 69 (2004).

53. *See* Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 L. & SOC'Y. REV. 509, 510 (2002).

54. Bucy et al., *supra* note 44, at 416 (citing David Litterick, *Rich-But by No Means Beyond the Dreams of Avarice*, DAILY TELEGRAPH, Nov. 19, 2005, at 33).

55. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 252–53 (1999).

56. Complaint at 2, Sec. Exch. Comm'n v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878.

Siddiqui, to mismark the values of securities, clearly indicating that Serageldin played a prominent role in orchestrating the scheme. The complaint states, "Serageldin frequently communicated to Higgs the specific P&L outcome he wanted. Higgs, in turn, directed Faisal Siddiqui or Salmaan Siddiqui to mark the book in a manner that would achieve the desired P&L."[57] The SEC suggested Serageldin was financially motivated because the decline in the value of the securities, in the absence of mismarking, "[W]ould cause hundreds of millions of dollars of losses, vaporize Defendant's hopes for multi-million dollar year-end bonuses and, in the case of Serageldin, imperil a highly-coveted promotion."[58] Quoting Serageldin, the SEC argues that he responded to expectations from higher-ups to generate profit: "Serageldin stated that he needed a more favorable P&L result because senior management expected him to make money: 'I want to be up a little bit of money today, because everyone's going to think we're going up and be very surprised if we're not.'"[59] On another occasion, Serageldin stated that "people are expecting us to make money. [The head of Credit Suisse Group's investment bank] knows what our positions are. Today, we have to be up at least 10 bucks [million]."[60] These forms of performance pressures—the need to "hit the numbers," meet growth targets, and respond to organizational pressures—are well established as reported causal explanations for white-collar crime.[61]

Contrary to the views of the SEC, Serageldin explained that neither money nor a promotion motivated him; instead, Serageldin insisted, "The motivation, your Honor, was to protect my reputation at the bank. At the time there was a lot of market turmoil, so I was protecting my reputation in the bank."[62] The court seemed skeptical of this explanation because losses were widespread at Credit Suisse, so Serageldin could not have suffered any more reputational loss than anyone else. Serageldin's view, however, was that he was particularly admired for his ability to navigate turbulent market conditions. He noted, "[W]ithin the bank I had a reputation to be able to manage these positions in a very difficult market while everyone else was losing money . . . I was trying to maintain that reputation."[63] He explained that it was not about money. Furthermore, this

57. *Id.* at 15.

58. *Id.* at 2.

59. *Id.* at 17.

60. *Id.* at 24.

61. *See* MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT (1983); James W. Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOC'Y 406 (1987); Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXECUTIVE 39, 40 (2004).

62. Pleading Hearing at 20, United States v. Serageldin, No. 1:12-CR-00090 (S.D.N.Y. May 10, 2013).

63. *Id.* at 21.

book with inflated market valuations was merely one of approximately thirty that he oversaw, and the mismarking constituted less than five percent of the trades he supervised. The inflation of the book did not translate to substantially increased earnings for him. Counsel for Serageldin was keen to differentiate Serageldin's case from other mismarking cases in which traders tried to hide ever-greater mounting losses, preserve their profitability to garner compensation, or affect a particular position tied to a big payout for a trader. Credit Suisse withheld $25 million in compensation from Serageldin, $20 million of which was deferred compensation for work completed prior to the mismarking in question ever began. Serageldin claimed he lost far more than he could ever have hoped to gain.

Contrary to the SEC's complaint and the audio recordings, Serageldin also claimed he was not the architect of the mismarking; he was a follower, not a leader. According to Serageldin, he discovered mismarking was already taking place, and if anything, followed his staff into the misconduct. In particular, Serageldin argues that he became aware some traders under his supervision were mismarking their positions when he received a report in late 2007 that aggregated data showing weighted average prices for books of securities.[64] Serageldin claims he suspected there was a significant gap in the valuations in the report and the price the bonds could actually be sold for in the market. Serageldin joined the conspiracy:

> After learning that *these men* [the other defendants] had been mismarking Credit Suisse's records of certain bonds at inflated levels above where they could be sold in the market . . . I allowed it to continue, and I agreed to allow additional false records to be generated. I joined the conspiracy in the hope of concealing the mismarks and the devaluation of these bonds.[65]

As such, Serageldin described his role in the fraud in passive terms. He learned of the fraud, allowed it, followed it, and joined it, but he did not lead it. Nevertheless, the court was also skeptical of Serageldin's claims on this point. If white-collar criminals are either leaders or followers, Judge Hellerstein determined:

> [H]e was a leader, and when things are run around you, there's no necessity for the leader to follow suit. Someone has got to stand up for what's right. And when he doesn't stand up for what's right, when

64. *Id.* at 17–18.
65. *Id.* at 13.

> a person doesn't do what's right and starts doing criminal things, he's a criminal.[66]

It is not entirely clear, however, notwithstanding the court's view that mismarking was systemic in Credit Suisse, whether the bank was actually willfully blind to the mismarking in the Serageldin case. The court noted, for example, that the bank could have compared the mismarked book against other books to see that there was inflation.[67] Pursuing this line of inquiry further, the court asked Serageldin if it was clear whether the bank knew that the bonds were mismarked, stating: "[Y]ou must have believed that management would either have accepted the deception or closed their eyes to the deception?"[68] The court also asked why the auditors had not caught the mismarking.[69] Serageldin appeared evasive in his replies: "I do not know why the process did not capture the mismarks. I guess the process was an imperfect process . . . ."[70] Serageldin explained that the traders recorded the market value of their positions at the end of each day without any objective evidence of the valuations, noting, "[I]t is the say-so of the trader and there is obviously some subjectivity in the matter."[71] Serageldin's evasiveness on this point may stem from the fact that he was downplaying his attempts to frustrate Credit Suisse's protocols to reduce the risk of detection.

Serageldin's strategies to circumvent Credit Suisse's protocols are detailed in the SEC's complaint, which demonstrated that Serageldin was clearly calculating in his decision-making processes to mismark the securities. For example, in order to resist scrutiny from the Price Testing group at Credit Suisse, which reviewed the valuations assigned to securities by traders, the defendants requested third party dealers to verify their prices. These assessments, however, were not independent because the dealers merely valued the securities at prices that the defendants themselves requested.[72] On another occasion, the SEC noted that "Serageldin instructed Higgs and another trader to select four positions that Price Testing could not test and to increase the prices on those positions 'to make back the money' that Price Testing was questioning."[73]

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66. Sentencing Hearing at 9–10, United States v. Serageldin, No. 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

67. Pleading Hearing at 18, United States v. Serageldin, No. 1:12-CR-00090 (S.D.N.Y. May 10, 2013).

68. *Id.* at 15.

69. *Id.* at 15–16.

70. *Id.* at 16.

71. *Id.* at 17.

72. *See* Complaint at 13–15, Sec. Exch. Comm'n v. Serageldin, No. 12-CV-0796 (S.D.N.Y. Feb. 1, 2012), 2012 WL 286878.

73. *Id.* at 21.

Furthermore, when the securities had been priced too high, Serageldin stated: "We should mark these down because someone is going to spot this."[74] It is also clear, according to the SEC, that Serageldin and his co-conspirators knew they were engaging in wrongdoing. The SEC stated:

> By the end of 2007, Defendants were in possession of ample market data showing that their bonds were grossly overvalued. Despite freely discussing that "housing was going down the tubes," and acknowledging that their bonds were overpriced and should be marked down, Defendants kept the bonds priced at falsely high levels at year-end.[75]

All of this, the SEC noted, showed that Serageldin knew that what he was doing was wrong and that by attempting to deceive the bank and reduce his risk of detection he was clearly calculating in his decision-making processes.

Serageldin managed, however, to paint a very different picture of his decision-making processes. Echoing Soltes's view that white-collar criminals do not seem to give much thought or reflection to the wrongdoing, Serageldin claimed that he didn't consider the costs or benefits of his actions. It seemed, in fact, that it had never occurred to Serageldin that he would ever commit a crime. Serageldin stated, "Your Honor, today is the most difficult day of my life. I never imagined I would be standing here awaiting sentencing for a crime."[76] He acknowledged that when he realized the mismarking were occurring, "the right thing to do would have been to stop, correct and address the misconduct. I recognize that this was a crucial moment of my life and I see that I failed miserably in the decisions I made at this time."[77] Moreover, Serageldin's submission to the court, and that of his mother, allowed him to show that he did not seem to share the negative personality traits most associated with leaders or white-collar criminals, though it was clear he was intelligent and determined. At just thirty-three years of age, Serageldin was managing his team at Credit Suisse, a position that came with a lot of responsibility. This achievement was even more impressive because Serageldin came from a family of immigrants and felt he had to work harder than everyone else to get to the same position and to be accepted. To provide insight to her son's character, Serageldin's mother explained that the family moved from Egypt to America when Serageldin was six years old. The family struggled to make ends meet, and Serageldin internalized the importance of hard

74. *Id.* at 23.

75. *Id.* at 3.

76. Sentencing Hearing at 45, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

77. *Id.* at 46.

work. Bullied at school, Serageldin felt he had to work twice as hard as everyone else to receive the respect and approval of his peers. It was not about money, but about "winning that respect and approval that were so hard, the acceptance that were so hard to come by as he was growing up."[78]

These explanations resonated with the court. Judge Hellerstein stated, "I too am a son of immigrants who came to the United States to find an opportunity that they never would have had had they not immigrated."[79] Moreover, contrary to the explanatory factors outlined by Gottfredson and Hirschi, Serageldin exercised considerable self-control from a young age. Serageldin also acknowledged, "I always believed by working harder than anyone I could succeed at almost anything. That was the case throughout my education, as well as my time at Credit Suisse. I was proud of the reputation I built at the bank. Your Honor, I loved my job."[80]

III. "A SMALL PIECE OF AN OVERALL EVIL CLIMATE": WHAT ROLE DOES ORGANIZATIONAL CULTURE PLAY?

In an attempt to explain why people commit crime, some experts have examined the role that society plays. Sutherland, an early pioneer in the study of white-collar crime, argued that crime was a learned behavior. Within intimate social groups, there is a process of communication and learning by interaction, through which people share their motivations, drives, and rationalizations.[81] Various rewards and punishments, including financial incentives, reputational issues, and power, may also influence behavior.[82] This theory was called differential association because it specified that the tendency to commit crime depended on the frequency and intensity of associations with other criminals.[83] Cressey further developed the theory in an empirical study of embezzlers.[84] He noted that embezzlers generally encountered financial difficulties that could not be shared but which could be solved privately in a manner which could be

78. *Id.* at 44.

79. *Id.* at 45.

80. *Id.* at 45–46.

81. Ross L. Matsueda, *Differential Social Organization, Collective Action, and Crime*, 46 CRIME L. & SOC. CHANGE 3, 5 (2006); Joe McGrath, *'Walk Softly and Carry No Stick': Culture, Opportunity, and Irresponsible Risk-Taking in the Irish Banking Sector*, 17 EUR. J. CRIMINOLOGY 86 (2020) [hereinafter McGrath, *Walk Softly and Carry No Stick*].

82. *See generally* Robert L. Burgess & Ronald L. Akers, *A Differential Association-Reinforcement Theory of Criminal Behavior*, 14 SOC. PROBS. 128 (1966).

83. *See generally* EDWIN HARDIN SUTHERLAND & DONALD RAY CRESSEY, CRIMINOLOGY (8th ed. 1970); EDWIN HARDIN SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (4th ed. 1947); EDWIN HARDIN SUTHERLAND, WHITE COLLAR CRIME (1949).

84. *See generally* DONALD RAY CRESSY, OTHER PEOPLE'S MONEY; A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT (1953).

verbalized as compatible with their own standards of morality. Cressey's work demonstrated that wrongdoing is not necessarily the result of belonging to a criminally deviant subgroup or being immersed in a criminal environment; those engaged in wrongdoing will often be law abiding, as will their colleagues, but they rationalize or "neutralize" their wrongdoing.[85] In Cressey's study, embezzlers were more likely to tell themselves that they were just borrowing the money, that the money was really theirs anyway, or that their actions were aberrations that did not define them. They neutralized their conduct not merely to explain it, but to explain it away.[86] Langevoort has observed that this form of rationalizing or neutralizing wrongdoing is not uncommon in "organizational hierarchies."[87] Cressey's tripartite classifications of pressure, opportunity, and rationalization were subsequently developed into an internationally prominent model known as the fraud triangle, which has since been adapted and developed further to explain various forms of fraud not restricted to embezzlement.[88]

Cultures of either compliance with or resistance to regulation develop within companies.[89] With regard to the latter, Clinard and Yeager argue that the key to understanding how the corporate environment creates conditions for criminality is to drop the fiction that the corporation is a person and to embrace the reality that it is a complex organization where responsibility is diffused and fragmented.[90] The organization is "criminogenic" when its internal structures, rather than people's personality traits or motivations, play some part in generating crime. Drawing on empirical work on tax evasion and anti-competitive practices,[91] Needleman and Needleman say that systems are crime coercive when they compel people to commit crimes for corporate profit "in which the individual system member is essentially a pawn, with few choices and few defenses against criminogenic pressures."[92] In his empirical work, Clinard determined that middle managers were most

85. *See generally* DAVID MATZA, DELINQUENCY AND DRIFT (1964).

86. *See generally* Nicole Leeper Piquero & Michael L. Benson, *White-Collar Crime and Criminal Careers*, 20 J. CONTEMP. CRIM. JUST. 148 (2004).

87. Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 874 (1995).

88. *See generally* David Carson & Barry Robinson, *Corporate Investigations*, *in* WHITE COLLAR CRIME IN IRELAND: LAW AND POLICY 49–73 (Joe McGrath ed., 2019).

89. *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

90. *See* MARSHALL B. CLINARD & PETER YEAGER, CORPORATE CRIME 272 (1980).

91. *See* William N. Leonard & Marvin Glenn Weber, *Automakers and Dealers: A Study of Criminogenic Market Forces*, 4 L. & SOC'Y REV. 407, 407 (1969). *See generally* Harvey A. Farberman, *A Criminogenic Market Structure: The Automobile Industry*, 16 SOC. Q. 438 (1975).

92. Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517, 520 (1979).

likely to be influenced by the ethical standards set by top management, and that middle managers responded to the pressures exerted by top management. Ethical standards were compromised in order to sustain profits and reduce costs. Pressure may come from above to perform well for the company so that "[u]ndue corporate pressures upon middle management may lead to their becoming engaged in illegal or unethical behavior."[93]

Research has led experts to have a better understanding of how cultural immersion can influence people and how people respond to authority. Asch's perception-based study showed that individuals were willing to give obviously incorrect answers to simple tasks, subjugating their decision-making processes due to a group dynamic.[94] In Milgram's famous experiment, participants were willing to administer severe electric shocks, on instructions from an apparently legitimate source, demonstrating that people were often willing to compromise their own moral standards and follow authority.[95] In the Stanford Prison Experiment, Zimbardo demonstrated that situational contexts and group dynamics facilitated the commission of torture of prisoners by guards.[96] In doing so, Zimbardo displaced "the long-held notion of the 'bad apple' with that of the 'bad barrel': the idea that the social setting and the system contaminate the individual, rather than the other way around."[97] Subsequent research has questioned the ethical underpinnings of these studies,[98] and the ability the replicate the results,[99] though the conclusions remain generally accepted.[100] Moreover, other empirical work has demonstrated that even when behavior is directed to serve organizational goals, information about wrongdoing is not always shared with the top brass in companies, so that the knowledge of crime or unethical behavior is pushed down in

93. MARSHALL BARRON CLINARD, CORPORATE ETHICS AND CRIME: THE ROLE OF MIDDLE MANAGEMENT 22 (1983) (italics omitted).

94. Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 222–36 (H. Guetzkow ed., 1951) (More recent efforts to replicate the test suggest, however, that the results are unstable.); Marie-France Lalancette & Lionel Standing, *Asch Fails Again*, 18 SOC. BEHAV. & PERSONALITY INT'L J. 7 (1990).

95. *See generally* THOMAS BLASS, OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM (2000).

96. PHILIP ZIMBARDO, THE LUCIFER EFFECT: HOW GOOD PEOPLE TURN EVIL (2007).

97. YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 49 (2018).

98. *See* Ian Nicholson, *Torture at Yale: Experimental Subjects, Laboratory Torment and the "Rehabilitation" of Milgram's "Obedience to Authority"*, 21 THEORY & PSYCHOL. 737 (2011).

99. Lalancette & Standing, *supra* note 94.

100. Teresa C. Kulig, Travis C. Pratt & Francis T. Cullen, *Revisiting the Stanford Prison Experiment: A Case Study in Organized Skepticism*, 28 J. CRIM. JUST. EDUC. 74 (2017).

organizations, along with the responsibility for it.[101] This is especially true when top executives pressure middle-management into achieving particular results, while being willfully blind as to how those results are achieved.[102]

The corporate structure may still facilitate crime even when the crimes damage the goals of the organization. This is likely to occur when the steps to prevent or control crime are considered more damaging to the organization than the wrongdoing itself. In those circumstances, crimes are "an unwelcome but unavoidable cost of doing business."[103] Within the securities industry, for example, Needleman and Needleman see:

> a market pattern in which flow is everything, and the intrinsic value of the basic commodity almost irrelevant. . . . More importantly, whatever losses they occasionally suffer through fraud (limited by insurance in any case) are less significant in terms of total profit than the benefits of keeping the overall flow of commerce unimpeded.[104]

If corporate culture can compel or tempt people into committing white-collar crime, there is also the possibility that ambitious people, with a high tolerance for risk-taking and little regard for corporate ethics, prefer to work for firms with a criminogenic culture.[105] People may "self-select" themselves to work in those companies.

In Serageldin's case, Judge Hellerstein determined that mismarking in Credit Suisse was a routine part of the corporate culture there. Judge Hellerstein stated:

> He was in a place where there was a climate that made it conducive to what he did. The bank was, as you call it, mismarking, but showing false profits much more extensively than Mr. Serageldin was doing. Mr. Serageldin's role was a small piece of an overall evil climate within the bank and with many other banks.[106]

According to the prosecution, the overstatements Serageldin oversaw amounted to one hundred million dollars, a small portion of the $2.65 billion in losses that Credit Suisse misstated.[107] A subsequent report later

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101. ROBERT JACKALL, MORAL MAZES: THE WORLD OF CORPORATE MANAGERS (1988).

102. J. S. Nelson, *Disclosure-Driven Crime*, 52 U.C. DAVIS L. REV. 1487 (2018).

103. Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517, 521 (1979) (italics omitted).

104. *Id.* at 524 (italics omitted).

105. Robert Apel & Raymond Paternoster, *Understanding "Criminogenic" Corporate Culture: What White-Collar Crime Researchers Can Learn from Studies of the Adolescent Employment–Crime Relationship*, *in* THE CRIMINOLOGY OF WHITE-COLLAR CRIME 15–33 (2009).

106. Sentencing Hearing at 9, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

107. *Id.* at 37–38.

concluded that the over-statement was actually closer to $37 million,[108] "slightly more than one percent of the bank's total restatement."[109] Even working with the $100 million figure, Judge Hellerstein concluded "that there was either a terrible climate in the bank because people tend to know what other people are doing. And Mr. Serageldin's crime, and it is a crime, was a crime that was duplicated by many others in many other departments."[110] On this basis, the Court refused to order any restitution for Credit Suisse, the apparent victim in the case. Judge Hellerstein stated, "I think the bank, having created a climate in which Mr. Serageldin has operated and not having shown to what extent, if at all, the bonuses paid to him would not otherwise have been paid, is not entitled to restitution."[111]

IV. "THE ONLY PERSON SINGLED OUT IN A CRIMINAL CASE FOR . . . THE CREDIT CRISIS"—WHAT STRUCTURAL FACTORS INFLUENCE WHITE-COLLAR CRIME?

Having outlined individual and environmental explanations, this section considers structural factors in crime causation. Some theorists argue that the structure of society is itself dysfunctional, and that this produces dysfunction at a micro level.[112] For example, Wacquant has concluded that structural factors offer the best explanations of crime, arguing that "hyper-ghettoes" emerged in the USA because of changes over the course of the late twentieth century to the labor market (when factories moved abroad and respectable working-class jobs became more elusive), housing policy (which concentrated social housing and social disadvantage in particular communities), and welfare policy (which did not provide enough to live on) over the course of the late twentieth century.[113] These changes on the macro or "structural" level impacted how people lived in disadvantaged communities, drawing attention to "the role of the state as a stratifying and classifying agency that wields a dominant influence on the social and symbolic order of the city."[114]

Similarly, in a detailed case study on organizational wrongdoing, Vaughan argued that the explosion of NASA's space shuttle, *Challenger*,

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108. Eisinger, *supra* note 7.

109. Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 163 (2014).

110. Sentencing Hearing at 38, United States v. Serageldin, 1:12-CR-00090 (S.D.N.Y. Dec. 5, 2013).

111. *Id.* at 53–54.

112. *See generally* WILLEM A. BONGER, CRIMINALITY AND ECONOMIC CONDITIONS (1916).

113. LOÏC WACQUANT & JOHN HOWE, URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY (2008).

114. Loïc Wacquant, *Urban Desolation and Symbolic Denigration in the Hyperghetto*, 73 SOC. PSYCHOL. Q. 215, 215 (2010).

was "socially organized and systematically produced by social structures . . . embedded in the banality of organizational life."[115] In that case, production pressures and economic constraints which arose from the broader political environment combined with managerial wrongdoing to induce a series of incremental mistakes; risk-taking and danger became normalized, institutionalized, and aligned with organizational goals. In doing so, Vaughan "shifts our attention from individual causal explanations to the structure of power and the power of structure and culture—factors that are difficult to identify and untangle yet have great impact on decision making in organizations."[116] As recognized by Vaughan, to understand why people commit white-collar crimes, "we must conceptualize individual action within its layered context—Persons as actors, the organization as a system of action, and the environment as the system of action within which the organization acts."[117] In this section, macrostructural factors are discussed as giving rise to an environment where there was a lack of effective supervision, intervention, and oversight, in which the Government created the conditions for irresponsible risk-taking in the banking sector.

In relation to white-collar crime, the structural factors which influence white-collar crime may include the lack of regulation, the wide use of alternatives to punishment, and the valorization of the economy in neoliberal societies, among others.[118] Deregulation, a lack of credible regulatory oversight, inadequate corporate governance, and poor risk management have been identified as structural causes of the financial crash in the US.[119] The deregulatory movement and its policies have a long historical trajectory, taking hold in the 1970s and 1980s when the importance of the New Deal restrictions and the impact of the Great Depression were no longer felt as keenly, ultimately triggering another boom-bust regulatory cycle. The separation of commercial and investment banking created by the Glass-Steagall Act of 1933 was weakened in the 1980s and 1990s through expansive interpretations of the "business of

115. DIANE VAUGHAN, THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA, at xiv (1996).

116. *Id.* at xv.

117. Diane Vaughan, *The Macro-Micro Connection in White-Collar Crime Theory*, *in* WHITE-COLLAR CRIME RECONSIDERED 124, 125 (Kip Schlegel & David Weisburd eds., 1992).

118. JOE MCGRATH, CORPORATE AND WHITE-COLLAR CRIME IN IRELAND: A NEW ARCHITECTURE OF REGULATORY ENFORCEMENT (2015).

119. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: THE FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011) [hereinafter FINANCIAL CRISIS INQUIRY REPORT] (including dissenting views).

banking" by the Office of the Comptroller of the Currency (OCC),[120] in part by pressure exerted by the banking industry,[121] before being repealed by the Gramm-Leach-Bliley Act in 1999, considered by some to be a significant factor contributing to the financial crash.[122] Restrictions on the geographical operations of banks were also loosened and lifted; banks were able to form branches with greater ease within and across state lines.[123] The erosion of interstate banking restrictions combined with the erosion of the Glass-Steagall constraints led to the merger and acquisition of banks into what is now known as systemically important financial institutions.[124]

Moreover, legislative measures like the Tax Reform Act in 1986, which had already begun in the 1970s, facilitated a process known as securitization. This process allowed banks to sell their loans to Special Purpose Vehicles which bundled debts together to sell as securities, backed by assets like mortgages, the kind Serageldin was selling.[125] These mortgage backed securities were thought to be particularly safe products because they diffused the risk of default among many parties and credit rating agencies that provided positive evaluations of them, not least because underwriters could shop around for the best rating.[126]

In 2000, the Commodity Futures Modernization Act allowed for the "over the counter" dealing of derivatives (contracts whose values were derived from other assets, securities, etc.) so they could be sold privately among traders and not on an exchange, thereby inhibiting transparency and oversight from regulators.[127] Though derivatives had long since been a feature of the financial services landscape, the existing market in derivatives grew and a new type of derivative, the credit default swap, proliferated. This allowed investors to 'insure' against the risk of default

120. S.T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the Business of Banking*, 63 U. MIAMI L. REV. 1041 (2008).

121. *See* Robert S. Plotkin, *What Meaning Does Glass-Steagall Have for Today's Financial World*, 95 BANKING L.J. 404 (1978).

122. Author E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 973 (2008).

123. Randall S. Kroszner & Philip E. Strahan, *What Drives Deregulation? Economics and Politics of the Relaxation of Bank Branching Restrictions*, 114 Q. J. ECON. 1437 (1990).

124. FINANCIAL CRISIS INQUIRY REPORT, *supra* note 119, at 52–53.

125. Gary Gorton & Andrew Metrick, *Regulating the Shadow Banking System*, 41 BROOKINGS PAPERS ECON. ACTIVITY 261, 270 (2010).

126. Lawrence White, *Markets: The Credit Rating Agencies*, 24 J. ECON. PERSP. 211, 220–21 (2010).

127. *The Role of Derivatives in the Financial Crisis: Hearing Before the Fin. Crisis Inquiry Commission*, 111th Cong. 9–10 (2010) [hereinafter *The Role of Derivatives in the Financial Crisis*] (statement of Michael Greenberger, Law School Professor, University of Maryland School of Law), https://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0630-Greenberger.pdf [https://perma.cc/644R-KL5A].

on a loan in return for a premium. Investors were swapping or hedging that risk in return for making a payment, which allowed them to limit their exposure, and to speculate further.[128] These derivatives would "allow market actors to take positions that magnify losses, heighten risk concentration in the financial system, raise the vulnerability in the financial system, and raise the vulnerability of interconnected financial firms to cascading liquidity and counterparty credit problems."[129] Moreover, banks were highly leveraged because they funded themselves more through short-term debt that could be withdrawn by providers in a deteriorating market, thereby creating conditions for a run.[130]

Meanwhile, some have argued that government policies helped fuel a property bubble, premised on fragile security, and ultimately contributed to a credit crisis.[131] For example, the Housing and Community Development Act of 1992 placed a positive obligation on government sponsored entities (GSEs), like Fanny Mae and Freddy Mac, to support the mortgage market and finance affordable home ownership by buying mortgages from lenders so they could use these funds to give more loans. The legislation required GSEs to buy a percentage of mortgages provided to low- and middle-income borrowers. The Department of Housing and Urban Development (HUD) set these targets, raising them from 42% in 1997 to 50% in 2001 and again to 55% in 2007.[132] In addition, underwriting standards fell so that loans were increasingly given without proper supporting documents from the borrower (liar loans), or were given to borrowers who had no income, job, or assets (NINJA loans).[133] Commenting on the fragile security underpinning these loans, the FCIC would later comment, "As a nation, we set aggressive homeownership goals. . . . Yet the government failed to ensure that the philosophy of opportunity was being matched by the practical realities on the ground."[134] In addition, after the 911 terrorist attacks and the bursting of the dot-com bubble, the Federal Reserve cut interest rates to stimulate the economy and encourage home sales with "mortgage interest rates that are at lows not seen in decades . . . ."[135]

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128. *See id.* at 11–14.

129. Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. REG. 91, 93 (2012).

130. *See generally* ERIK F. GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION 427–60 (2014).

131. *See* FINANCIAL CRISIS INQUIRY REPORT, *supra* note 119, at xxii.

132. *Id.* at 183.

133. *See id.* at 512.

134. *Id.* at xxvii.

135. *The Economic Outlook: Hearing Before the Joint Economic Committee*, 107th Cong. (2002) (statement of Alan Greenspan, Chairman, Board of Directors of the Federal Reserve System),

Gathering these threads together, the government facilitated deregulation and eroded the division between commercial and investment banking so that banks could not just garner earnings arising from the interest on mortgages, but could also securitise and trade those mortgages for greater profit. The government, through its various branches, lowered interest rates to encourage mortgage lending; encouraged banks to lend to borrowers of modest means at higher risk of default; and permitted, through the absence of regulation, dispensation of mortgages through weak underwriting standards. Gerding has called this phenomenon the regulatory instability hypothesis, a context in which "strong forces act to decay financial regulations at the precise moment when they are most needed—when markets boom, investors and financial institutions exercise less care and take on more risk and leverage, and financial crisis looms."[136] It was at this moment that regulations were needed the most because banks, in turn, seem to have used subprime mortgages of questionable creditworthiness as collateral for highly leveraged securities that were marketed as exceptionally creditworthy, thereby transforming "a sow's ear into a silk purse."[137] When the property market subsequently declined in the mid-2000s, and people defaulted on their mortgages, credit rating agencies downgraded mortgage-backed securities, and banks lost billions on those assets. It was in this context that Serageldin found himself in 2007 and early 2008, under pressure to generate profits while trading assets which were declining in value.

In addition to the state of the financial services sector, the manner in which supervision and enforcement activities are conducted is also important. Credible oversight and enforcement can increase the risk of detection of wrongdoing and may discourage wrongdoers from engaging in irresponsible risk taking in the financial services sector.[138] Enforcement is also contingent on the social, political, and economic context which prevails at that time.[139] Unsurprisingly, perhaps, a political context which favors light-touch regulation will also impact the relative intrusiveness of regulators and their approaches.[140] For example, the Chairman of the Federal Reserve from 1987 to 2006, Alan Greenspan, was known for

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https://www.federalreserve.gov/boarddocs/testimony/2002/20021113/default.htm [https://perma.cc/E5U2-V8WN].

136. GERDING, *supra* note 130.

137. Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ [https://perma.cc/CUE5-CVM3].

138. McGrath, *Walk Softly and Carry No Stick*, *supra* note 70.

139. Joe McGrath, *Regulating White-Collar Crime in Ireland: An Analysis Using the Lens of Governmentality*, 72 CRIME L. & SOC. CHANGE, 445 (2019).

140. *See* Roman Tomasic, *The Financial Crisis and the Haphazard Pursuit of Financial Crime*, 18 J. FIN. CRIME 7, 11 (2011).

favoring light-touch regulation, having argued that leaving the market to its own devices was in itself a form of regulation, used that proposition in public speeches to ask if Government intervention did more harm than good.[141] It is the SEC, however, that maintains a more central role in enforcing federal securities laws. In doing so, it is known for preferring compliance-orientated strategies to punitive ones and tends to view referrals for criminal prosecution as a last resort.

Research into the SEC's enforcement practices has long since noted its preference for addressing cases internally, and a reluctance to refer cases for prosecution.[142] This preference for civil and administrative sanctions is understandable; they provide fast ways of addressing harm and resolving problems, allow the SEC to resolve cases without resort to the criminal justice system, and involve lower levels of proof and evidence than required in criminal cases. It has been found, however, that "the misdeeds most vulnerable to criminal sanctions are also most likely to escape legal action entirely[,]" raising questions as to whether the SEC addresses wrongdoing proportionately and effectively.[143] In addition, a recent empirical analysis of SEC civil and administrative enforcement data from 2005–2007 found that individuals in big firms fare better in enforcement actions than those in smaller firms because (1) the actions taken against large entities are less likely to be accompanied by enforcement actions against individuals, and (2) because individuals at big firms face less punitive sanctions.[144] It "demonstrates a systematic lack of action against individual violators in high-profile cases . . . ,"[145] again raising the question of whether its enforcement actions are optimal in deterring misconduct.

Recent criticisms have questioned why the SEC did not detect the major multi-billion fraud committed by Bernie Madoff, notwithstanding numerous warning signs.[146] Others have criticized its "abject failure to monitor the financial crimes and shenanigans engaged in by investment

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141. Alan Greenspan, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Financial Markets Conference of the Federal Reserve Bank of Atlanta: Government Regulation and Derivative Contracts (Feb. 21, 1997), https://www.federalreserve.gov/boarddocs/speeches/1997/19970221.htm [https://perma.cc/7X44-MCTH].

142. Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders*, 19 L. & SOC'Y REV. 179, 182 (1985).

143. Susan P. Shapiro, *Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime*, 55 AM. SOC. REV. 346, 360 (1990).

144. Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 728 (2012).

145. *Id.* at 683.

146. *See generally* U.S. SEC. AND EXCH. COMM'N OFFICE OF INVESTIGATIONS, INVESTIGATION OF THE FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME, REPORT OIG-509 (2009).

banks and other irresponsible entities whose reckless behavior collectively triggered what has become known as 'the Great Economic Meltdown.'"[147] In its defense, the SEC has protested that it operated with smaller budgets in the lead-up to the crisis but was expected to oversee an expanded securities market with more complex financial operations. Testifying before Congress, the Chairperson of the SEC, Mary Schapiro, stated:

> The agency has suffered a significant decline in staffing levels, due to several years of flat or declining budgets. Between 2005 and 2007, the agency lost 10 percent of its employees . . . . Yet as the SEC staff has declined, the securities markets grew dramatically. For example, since 2005 the number of investment advisers registered with the Commission has increased by 32 percent and their assets under management have jumped by over 70 percent (to now more than $40 trillion).[148]

The DOJ, which monopolizes the power to criminally prosecute federal crimes at the federal level, has also been criticized for addressing the wrongdoing arising from the financial crisis through negotiated settlement agreements rather than criminal prosecutions.[149] Despite appearing remarkably punitive due to the very high financial penalties secured in these agreements, these settlements have been severely criticized for failing to deliver individual accountability and for lacking sufficient judicial oversight. Garrett has noted that "[i]n about two-thirds of the cases involving deferred prosecution or non-prosecution agreements and public corporations, the company was punished, but no employees were prosecuted."[150]

The general reluctance to prosecute bankers for the financial crash has precipitated academic discussion and comparisons with criminal justice responses to financial crises in the past. For example, while deregulatory policies and a lack of credible oversight are identified as common factors in the financial crisis of 2008 and the S&L crisis in the 1980s, the S&L crisis generated a stiff criminal justice response, unlike

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147. Gilbert Geis, *Unaccountable External Auditors and Their Role in the Economic Meltdown*, *in* HOW THEY GOT AWAY WITH IT: WHITE COLLAR CRIMINALS AND THE FINANCIAL MELTDOWN 85–103 (Susan Will, Stephen Handelman & David C. Brotherton eds., 2012).

148. *Testimony Before the Subcommittee on Financial Services and General Government by Chairman Mary Schapiro*, 111th Cong. (2009) (statement of Mary Schapiro, Chairman, U.S. Securities and Exchange Commission), https://www.sec.gov/news/testimony/2009/ts031109mls.htm [https://perma.cc/R6TU-URUY].

149. *See* Steven Arons, David McLaughlin & Greg Farrell, *Deutsche Bank Completes $7.2 Billion U.S. Mortgage Pact*, BLOOMBERG (Jan. 17, 2017), https://www.bloomberg.com/news/articles/2017-01-17/doj-deutsche-bank-agrees-to-pay-7-2b-for-misleading-investors [https://perma.cc/2AU8-7VJ7].

150. BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 13 (2014).

the recent financial crisis.[151] As noted by Pontell et al., "[T]he savings and loan crisis of the 1980s resulted in over a thousand convictions of thrift executives and others at, or near the top of the corporate food chain."[152] Serageldin, however, appears to have been the only banker of any seniority to have been prosecuted for any role in the financial crisis of 2008, and even then, some have suggested that he was, at best, a middle manager in Credit Suisse.[153]

Counsel for Serageldin also noted that few other cases of wrongdoing arising from the financial crisis appear to have been detected and prosecuted by the Department of Justice. This trial was an exceptional one "[b]ecause he is really by some counts the only person that has been singled out in a criminal case for what some people call the credit crisis, financial crisis . . . ."[154] Counsel for Serageldin observed "that he may go to prison here today is a huge unwarranted disparity to what the other people who likely were mismarking portfolios across Wall Street and maybe, as your Honor observed, within Credit Suisse."[155] The Court was unimpressed with this argument, noting: "It reminds me of five robbers complaining that the sixth did not get caught."[156] His counsel countered, "In this point, Mr. Serageldin is the sixth robber. The other five seem to have gotten away."[157] Serageldin is not the villain of the piece, but rather, the victim of a broader structural context, prosecuted "for something that happened when the credit world sort of came down around Mr. Serageldin's head . . . ."[158]

In summation, this section sought to locate individual acts and organizational culture within the broader regulatory environment. In particular, it noted the argument, well canvassed in the literature, that the State created the conditions for Serageldin's fraud because legislative initiatives eroded the separation of commercial and investment banking. In the past, banks had generated profit from interest on mortgages, but now they could securitize those mortgages and earn much higher profits from trading them. Deregulatory initiatives weakened the SEC and resourcing issues constrained its operations. Low interest rates set by the Federal

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151. Henry N. Pontell, William K. Black & Gilbert Geis, *Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 CRIME L. & SOC. CHANGE 1, 6 (2014).

152. *Id.*

153. *See* Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 155 (2015).

154. Sentencing Hearing at 11, United States v. Serageldin, No. 1:12-CV-0796 (S.D.N.Y. Dec. 5, 2013).

155. *Id.* at 19.

156. *Id.* at 20.

157. *Id.*

158. *Id.* at 19.

Reserve helped to stimulate a housing boom, and the government encouraged banks to give loans to those of more modest means, stimulating the subprime market. Weaker underwriting standards were permitted so that mortgages were offered to those at an increased risk of being unable to repay the loan. The level of supervision and oversight by regulatory authorities was low, and individuals in large institutions were unlikely to be punished severely and very unlikely to be prosecuted.

It is in this broader structural context that Serageldin found himself in 2007 and early 2008. He was trading mortgage-backed securities as the subprime crisis escalated. He experienced personal and organizational pressure to generate profits while trading assets that were declining in value. He mismarked assets in the hopes that he might trade his way out of difficulties. Broader macro-level forces informed micro-level decisions made by Serageldin as an individual working in an organization. In this context, "the competitive environment creates the structural impetus for misconduct; organizational characteristics provide opportunities; and the regulatory environment, systematically failing because of structurally engendered constraints, encourages individuals to respond to competitive pressures by taking advantage of the socially organized opportunities for deviance that are available in organizations."[159] This is not to say that individuals do not exercise power in making their own choices. For example, though they may have experienced competitive pressures differently, some people at Credit Suisse did not mismark securities despite working in the same context as Serageldin. Nevertheless, this section illustrates how white-collar crime can be informed by a macro-level context, such that dysfunction at a broader regulatory level trickles down to organizational and individual levels.

CONCLUSION

Legal scholars have long since recognized that the "good man" and the "bad man" have different reasons for obeying the law.[160] Holmes suggested that the good man will obey the law because he thinks it's the right thing to do, but the bad man "who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."[161] He continues,

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such

159. Diane Vaughan, *The Macro-Micro Connection in White-Collar Crime Theory*, *in* WHITE-COLLAR CRIME RECONSIDERED 124, 127 (Kip Schlegel & David Weisburd eds., 1992).

160. *See generally* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

161. *Id.* at 459.

> knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[162]

While most scholarship is concerned with the bad man, some scholarship, particularly in the field of compliance, considers matters from the perspective of the good man. Some people will obey the law simply because it is the right thing to do, "not because they calculate that the costs of crime exceed its benefits; crime is simply off their deliberative agenda . . . ."[163] It is also recognized that some people will obey the law when they think it is fairly applied and maps onto their values.[164] Feldman, for example, suggests that there are two types of good people who break the law. First, there are the good people who deceive themselves into genuinely believing that their actions are not wrongful or immoral. Second, there are people who know what they are doing is wrong but can rationalize their wrongdoing to preserve their views of themselves as generally law-abiding people. These two types of good people exhibit different levels of self-awareness and different motivations for complying with the law.[165]

Serageldin does not appear to conform to the idea of a "bad man" who obeys the law because he fears punishment. From his own perspective, it seems that he never really thoughtfully considered the costs and benefits of his actions, that he did not consider getting caught, or even that he was consciously thinking that he was committing crimes. He describes himself as a driven, diligent worker who does not lack self-control. He said he was not motivated by profit but committed his crimes to protect his reputation in Credit Suisse as someone who could navigate turbulent financial conditions with relative ease.

Moreover, Serageldin was strongly influenced by the context and culture in which he was immersed, in which Credit Suisse arguably made insufficient efforts to detect apparently widespread and routine mismarking. Misconduct was made easier by structural issues: not caused by a bad apple, but by a bad barrel. Serageldin's wrongdoing within Credit Suisse took place within a broader deregulatory or light-touch regulatory environment, which disfavored intrusive, harsh enforcement, and that generated the conditions for dysfunction at individual and organizational

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162. *Id.*

163. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 94 (Harris, Hawkins, Lloyd-Bostock & McBarnet eds., 1992).

164. *See generally* CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOUR: INTEGRATING THEORIES OF REGULATION, ENFORCEMENT, COMPLIANCE AND ETHICS (2015); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

165. *See* YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR 140 (2018).

levels. Some suggest that culture is neither what is written into policy documents, nor how people interpret those policies in practice; culture is what happens when no one is watching. If so, this raises the question of whether Credit Suisse was willfully blind to its inner workings, thereby creating generative conditions for crime. The importance of this observation is that it reminds us that crime is not aberrational; good people can do bad things when those things are routinized, rationalized, and networked as normal. Moreover, when operating within a culture where wrongdoing is routine and regulatory controls are insufficient, wrongdoers may not be able to accurately evaluate both why they did such actions, or to fully appreciate the unethical nature of those actions so that they maintain their positive images of themselves as moral, law-abiding persons. In regard to other aspects of their lives, they may really be those persons. At the time Serageldin committed his crimes, he seemed to recognize that his actions were unethical, that he made mistakes, and that he exercised poor judgment, but he also sought to explain how his chronic pattern of offending was aberrational. He falls within Feldman's second classification, the good man who knows his conduct is wrong but seeks to rationalize, neutralize, and explain it away.